No. 11,822

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EMANUEL STAVROS HOUVARDAS,
Appellant,

vs.

I. F. WIXON, District Director of Immigration and Naturalization,
Appellee.

OPENING BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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PRELIMINARY STATEMENT.

Appellant is an alien who has resided continuously in California since 1912 after legally entering the United States from the Island of Samos, Greece.

On March 18, 1946, the Attorney General of the United States ordered appellant deported because since his entry appellant has been sentenced to a term of imprisonment more than once for a term of more than one year for the commission of crimes involving moral turpitude.

Appellant petitioned the United States District Court, for the Northern District of California, for a writ of habeas corpus. (R. 2-12.) The writ was de-

nied (R. 15) by District Judge Michael J. Roche, and this appeal followed. (R. 16.)

JURISDICTION.

Jurisdiction of the District Court to entertain the petition for habeas corpus is conferred by 28 U. S. C. §§ 451, 452. Jurisdiction of the Circuit Court of Appeals to review the District Court's final order denying habeas corpus is conferred by 28 U. S. C. § 463.

STATUTE INVOLVED.

The Act of February 5, 1917, as amended (8 U. S. C. § 155 (a)) so far as relevant to this proceeding, provides:

> "* * * any alien who, after May 1, 1917, is sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry; * * * shall, upon the warrant of the Attorney General, be taken into custody and deported. * * * *The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned,* * *"[1]

[1] Italics ours unless otherwise stated.

QUESTIONS PRESENTED.

1. Whether appellant may be lawfully deported from the United States without first affording him the opportunity to apply for and to be heard on his application for a pardon within the meaning, purpose and intent of 8 U. S. C. § 155 (a) (Act of February 5, 1917, as amended).

2. Whether appellant has been deprived of liberty or property without due process of law in ordering his deportation where his application for a pardon has not been finally determined or acted upon.

3. Whether the Attorney General, through the Immigration and Naturalization Service, has not heretofore recognized appellant's right to apply for and be heard on his pardon application by granting appellant a stay of the deportation proceedings to apply for such pardon.

SPECIFICATION OF ERRORS.

1. The District Court erred in denying the petition for a writ of habeas corpus and discharging the restraining order theretofore issued by the Court.

2. The District Court erred in failing to hold that the denial to appellant of the right or opportunity to apply for and be heard on a pardon application constituted a denial to appellant of the right to due process of law and of the equal protection of the law as guaranteed to him by the Fifth and Fourteenth Amendments to the Federal Constitution.

3. The District Court erred in failing to recognize appellant's right to apply for and be heard on his pardon application by ignoring the fact that the Immigration Department had heretofore recognized and acknowledged this right by staying the deportation proceedings so as to permit appellant to apply for a pardon.

STATEMENT OF THE CASE.

The appellant is a native of Greece. There is no dispute as to his alienage nor as to the lawfulness of his entry. He arrived in the United States on the S.S. "King Albert" in the month of March or April, 1912,—some thirty-six years ago,—when he was an eighteen year old boy. Upon his arrival at the Port of New York, N. Y., he was duly admitted for permanent residence in the United States by the Immigration authorities at said Port. Immediately after his arrival and clearance by the Immigration authorities the appellant proceeded directly to the State of California where he has maintained continuous residence for the past thirty-six years. The appellant is now fifty-four years of age. (R. 2-3.)

Misfortune first overtook the appellant when he was accused by the District Attorney of Los Angeles County in 1939 of two counts of forgery of a fictitious name. He was tried and found guilty by the Court on both of these counts, execution of sentence was suspended and he was placed on probation for a period of five years. (R. 3-4.)

Again in 1942 he was accused in Fresno County of violating Section 288-a of the California Penal Code. He pleaded guilty to this charge, moved for probation, probation was denied and he was sentenced on April 14, 1942 to imprisonment in the California State Prison at San Quentin. (R. 4.)

Thereafter, and on April 29, 1942, the Superior Court in and for the County of Los Angeles made and entered the following order concerning appellant:

> "Probation having been heretofore revoked, the sentence imposed on February 14, 1939, committing the defendant to the California State Prison at San Quentin for the term prescribed by law as to each of Counts 1 and 2, *concurrently,* are placed into full force and effect. These sentences are ordered to run *concurrently* with State Prison sentence pronounced in Fresno County, which defendant is now serving." (R. 5.)

On March 22, 1944, the California State Board of Prison Terms and Paroles made and entered an order fixing appellant's term of imprisonment. (R. 6-7.)

Appellant was confined at the State Prison at San Quentin until January 23, 1945, when he was released on parole. His parole will expire April 25, 1948, at which time appellant will have paid in full the penalties imposed upon him for his misdeeds and he will once more be a free man, his debt to society having been fully satisfied.

After his release from prison, and on or about September 12, 1946, appellant, through his then attorney, sought to apply for a pardon for his crimes to Hon-

orable Earl Warren, Governor of the State of California. The appellant, through his then attorney, was advised by the Governor's secretary that appellant's pardon application would be entertained only by the Governor upon compliance by the appellant with the provisions of the Procedure for Restoration of Rights and Application for Pardon as set forth in Sections 4852.01 to 4852.2 of the Penal Code.[2]

At this stage of the record appellant then found himself confronted with a provision of the pardon act, Section 4852.06 which provides:

> "No such petition (for a pardon) shall be filed until and unless the petitioner has *continuously* resided, after leaving prison, in the county in which it is filed for a period of not less than *three years* immediately preceding the date of filing the petition * * *"

It is at once apparent that appellant, by virtue of this provision, became stalemated. His hands became legally tied and he was powerless to further attempt extricating himself from his predicament until he had first complied with the residential requirements of the statute. These requirements he fulfilled on January 23, 1948, and accordingly he is now free to pursue the first of the steps requisite to his application for a

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[2]These provisions were enacted at the 1943 regular session of the California Legislature and added to the Penal Code by Stats. 1943, Chap. 400, effective May 13, 1943. The act is commonly known as the "Deuel bill" and was initiated and sponsored by Governor Warren.

pardon.[3] On or after April 25, 1948, the termination date of his parole, appellant will then be permitted to file his Petition for a Certificate of Rehabilitation and Pardon. (Penal Code Section 4852.18.) This the appellant proposes to do without unnecessary delay.

The issues joined by the pleadings appear in the Transcript of Record on file herein. It would be repetitious and burdensome to this Honorable Court to restate the pleadings. Reference to the Record will disclose that the pleadings and the issues so raised thereby are essentially simple.

SUMMARY OF ISSUES AND LEGAL ARGUMENT.

From what heretofore has been related there becomes crystalized a simple, fundamental and vital issue, and an interpretation of the statute involved, which has not heretofore been passed upon or adjudicated by the Courts, is now called for. The issue is: *Whether an alien may be lawfully deported without first affording him the legal right to be heard on his application for a pardon. Conversely, may the government summarily banish or exile an alien from the country by cutting off his right to seek a pardon at a*

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[3]On February 27, 1948, appellant filed with the County Clerk of Marin County, California, a Notice of Intention to Apply for Certificate of Rehabilitation and Pardon as required by Penal Code, Section 4852.01, and on the same date caused to be served upon the Chief of Police of the City of San Rafael, a certified copy of the notice of intention filed with the County Clerk. (Penal Code, Section 4852.02.)

time when this right is in the orderly process of fruition; when the right is available to him; and when the right has not been exhausted?

POINT I.

THE PLAIN INTENDMENT OF THE ACT OF FEBRUARY 5, 1917, IS THAT A PARDON BARS DEPORTATION.

> "The provision of this section (8 U. S. C. 155 (a)) respecting the deportation of aliens convicted of a crime involving moral turpitude *shall not apply to one who has been pardoned,* * * *"

It clearly follows that executive clemency is distinctly intended by the Congress to operate as a complete bar to deportation. This is definitely recognized by the Courts, as was held in *U. S. ex rel. Kowalenski v. Flynn,* 17 F. (2d) 524, that disabilities growing out of an offense requiring deportation are removed by pardon.

In the lower Court the appellee's sole point of insistence was that the words of the statute "has been pardoned" must be taken literally, and the past tense having been employed, that the statute cannot be construed to mean a pardon in the future. This contention suggests the weird notion that a pardon is of no avail to an alien unless he is possessed of it at the very time he is served with a warrant of deportation, and possibly until he is in the act of being removed physically from the country. Let us analyze this absurdity.

At the outset, the section under discussion, is *penal* in its nature, and hence any doubt concerning the application thereof should be resolved favorably to the alien. See: *Wallis v. Tecchio,* 65 F. (2d) 250.

The following are some of the relevant rules on statutory interpretation:

> When unambiguous language in a statute produces ambiguous results or manifest injustice, the Court must give it an application reasonably within intent of law.
>
> *Tillinghast v. Tillinghast,* 25 F. (2d) 531.

It is well settled law that, where a strict construction of a statute leads to injustice, absurdity and incongruity, the Court will look to the purpose and the spirit of the statute in declaring its effect.

> *In re Cahn, Belt & Co.,* 27 App. D. C. 173;
> *Fields v. United States,* 27 App. D. C. 433;
> *United States v. Day,* 27 App. D. C. 458;
> *Moss v. United States,* 29 App. D. C. 188;
> *Garrison v. Dist. of Columbia,* 30 App. D. C. 515;
> *Dist. of Columbia v. Dewalt,* 31 App. D. C. 326.

In the case of *In re Cahn, Belt & Co.,* supra, at page 181, the Court quoted with approval from Lewis' Sunderland, Stat. Const. §633, as follows:

> "The *intent* is the vital part, the essence of the law, and the primary rule of construction is to ascertain and give effect to that intent. 'The intention of the Legislature in enacting a law is the law itself, and must be enforced when ascer-

tained, although it may not be consistent with the strict letter of the statute. Courts will not follow the letter of a statute, when it leads away from the true intent and purpose of the Legislature and to conclusions inconsistent with the general purpose of the act.' ".

"In pursuance of the general object of giving effect to the intention of the legislature, the Courts are not controlled by the literal meaning of the language of the statute, but the spirit or intention of the law prevails over the letter thereof, *it being generally recognized that whatever is within the spirit of the statute is within the statute although it is not within the letter thereof, while that which is within the letter, although not within the spirit, is not within the statute.* Effect will be given the real intention even though contrary to the letter of the law. The rule of construction according to the spirit of the law is especially applicable where adherence to the letter *would result in absurdity or injustice,* or would lead to contradictions, *or would defeat the plain purpose of the act,* or where the provision was inserted through inadvertence. *In following his rule, words may be modified or rejected and others substituted,* or words and phrases may be transposed."

59 C. J. 964-968;

Fleischmann Constr. Co. v. U. S., 270 U. S. 349, 70 L. Ed. 624;

Barrett v. Van Pelt, 268 U. S. 85, 69 L. Ed. 857;

Takao Ozawa v. U. S., 260 U. S. 178, 67 L. Ed. 199;

Holy Trinity Church v. U. S., 134 U. S. 457, 26 L. Ed. 226;
U. S. v. Katz, 271 U. S. 354, 70 L. Ed. 986.

"In the interpretation of statutes courts are not bound by *grammatical* rules, and may ascertain the meaning of words by the context."
In re Haines, 195 Cal. 605 at 613.

With the foregoing salutary rules in mind, it is a once plain that the words "has been pardoned" were not meant to be operative in their strict, literal or grammatical sense. Congress employed the words *generally,* to connote the idea that a pardon whenever lawfully obtained, *past, present or future,* effectively and automatically will place the alien beyond the reach of the Immigration authorities and remove the peril of deportation. Otherwise, an absurd result would follow and the intention of Congress rendered meaningless. For example: Let us assume the case of an alien, who since May 1, 1917, was sentenced to imprisonment for a crime involving moral turpitude. While incarcerated the Immigration authorities notify the prison officials that they wish a hold placed on the alien prisoner. Upon completion of his sentence, he is immediately served with a warrant of deportation, taken before an Immigration Commissioner, heard and ordered deported. Wherein has the alien either the time, the opportunity or the right to apply for a pardon? Wherein is the intention of Congress allowed to be pursued in orderly and legal fashion?

Again, an alien has been once imprisoned for the type of crime denounced. He again is convicted of that class of crime and is undergoing a sentence of imprisonment. It would therefore follow, according to appellee's view of the statute, that the alien would have to obtain a pardon on his *first* conviction, or suffer *immediate* deportation after release for service of sentence on his *second* conviction. This is so, because it is conceivable that while undergoing sentence on his *second* conviction a deportation warrant could issue, a hearing held and deportation ordered, all at time while the alien was in penal custody, and powerless to either ask for or receive a pardon, so that upon his release he could be taken immediately by the Immigration authorities and without further adieu transported out of the country. Is this what Congress meant when it declared that a pardon bars deportation?

To otherwise hold, or to give effect to appellee's view of the construction to be given the statute, would in effect be placing the imprimatur of this Court on kidnapping by the Government.

POINT II.

TO DENY THE RIGHT TO LAWFULLY APPLY FOR A PARDON IS TO DENY THE RIGHT TO DUE PROCESS OF LAW.

The appellant is not unmindful of the general rule in cases of this character, namely, that it is not the primary function of this Court to try the right of the alien to enter or remain in the United States, but the power of this Court is limited to ascertaining whether

or not the record shows that the proceedings in the matter are either unfair or otherwise lacking in the essential elements of due process of law, or that the Immigration Authorities are proceeding on an erroneous view of the law. If it thus appears to this Court that the procedings in the instant case reflect any interference with the appellant's right to be fairly heard, then this Court must review the case. The statute in question by enumerating the conditions upon which deportation will lie naturally prohibits deportation in other cases. Therefore, when the record shows that the Immigration officials are exceeding their power by either departing from the plain intent of the statute or completely ignoring it, the alien may then properly demand his release from deportation upon habeas corpus.

The appellant does not assert that he has any vested right to remain in this country, but he most vigorously asserts that he has the right to exhaust the rights conferred upon him by Congress. He asserts that he has the right to lawfully apply in accordance with law for a pardon. If deportation is permitted to cut off the orderly process of this alien's application for a pardon, then the alien's right to due process of law as guaranteed is denied him.

It requires no citation of authority to sustain the principle that aliens, as well as citizens, are entitled to apply for, be heard upon and be granted pardons for their crimes.

To obtain a pardon it must be applied for. Other than the rare cases of a general amnesty, the essential

act of applying for a pardon must be initiated by the person who hopes to be the recipient thereof. A pardon does not descend as grace from on High to a supine sinner. The Congress has not set forth in the statute any mode or procedure to be followed. These procedural matters and the minutia of detail therewith connected are evidently left to the several states in accordance with their respective and various pardon statutes. However, there can be no mistake that Congress has definitely and emphatically declared that a pardon will relieve the alien from the dire consequences of deportation. *"Ubi Jus Ibi Remedium"* is the underlying thought of Congress in this respect.

Therefore, any interference with the orderly procedure toward the end of a proper presentation of appellant's request for a pardon or the prevention from obtaining a hearing on his pardon application is a complete deprival of appellant's liberty and property without due process of law.

POINT III.

THE IMMIGRATION SERVICE IN HERETOFORE STAYING DEPORTATION PROCEEDINGS TO AFFORD APPELLANT THE OPPORTUNITY TO APPLY FOR A PARDON, HAS CONCEDED THAT APPELLANT MAY NOT BE DEPORTED UNTIL HE HAS FIRST EXHAUSTED HIS RIGHT TO BE FULLY HEARD ON HIS PARDON APPLICATION.

The record shows (Appellant's Exhibits "A" and "B" and Appellant's Exhibit "A" in evidence) that heretofore the appellant made application to the Immigration Service for a stay of the deportation pro-

ceedings (after a deportation warrant had issued) and that the proceedings were stayed to "afford opportunity" to "secure pardon" (Appellant's Exhibit "A").

The Commissioner of Immigration, according to File No. 5-489275 in evidence as Appellee's Exhibit "A", is of record as stating on May 16, 1946:

> "Subsequently, information was submitted showing that application for pardon in behalf of the alien was being made and the request is now made that deportation of the subject scheduled for May 17, 1946 be stayed. *Under the circumstances, this request may be granted.*"

The conduct of the Immigration Service in this respect calls for the application of the principles of contemporaneous construction, which when applied to the facts of the case at bar clearly demonstrates that the principle contended for by appellant is definitely recognized and subscribed to by the appellee.

> "The contemporaneous construction placed upon a statute by the officers or departments charged with the duty of executing it is entitled to more or less weight, especially if such construction has been made by the highest officers in the executive department of the Government, * * * and, while not generally controlling, where the case is not extreme and no vested rights are involved, such construction should not be disregarded or overturned except for the most cogent reasons and unless clearly erroneous. * * * The consideration to be accorded executive consideration is also especially weighty in the case of stat-

utes prescribing penalties or levying impositions, where the executive construction has been in favor of the persons affected." 59 C. J. 1025.

This rule has been applied in numerous instances by United States courts, among which cases are the following:

United States v. Jackson, 74 Law. Ed. 369;
Brewster v. Gage, 74 Law. Ed. 457, at p. 463.

The purpose of acquainting the Court with the foregoing rules relative to contemporaneous construction is the fact that under date of May 14, 1946 the petitioner's then counsel, by telegram to the head of the Immigration and Naturalization Service at Philadelphia, Pa., in view of then imminent deportation proceedings, made application for a re-opening of the case and likewise for a stay of proceedings upon the further ground that petitioner was taking steps to seek a pardon.

Thereafter and on May 16, 1946, the Assistant Commissioner of the Immigration and Naturalization Service by telegram advised petitioner's then counsel that the deportation of the petitioner was stayed thirty days to afford opportunity to secure a pardon.

Thereafter, by letter the Immigration Service was advised that the thirty day extension was not sufficient in view of the laws of California relative to the applications for pardons and additional time was sought to accomplish this purpose, but the Immigration Service did not see fit to grant additional time.

We believe that the Immigration Service, in acting on the request to apply for a pardon, recognized the right of an alien to apply for a pardon, and by its acts in granting a stay of proceedings to apply for the pardon, has placed a construction upon the terms of the statute in question as contended for by the petitioner, namely, the Department has recognized by its own affirmative act the right to apply for a pardon. We believe that the doctrine of contemporaneous construction, therefore, becomes applicable.

CONCLUSION.

Diligent research has failed to find any case construing the particular phrase of the statute in question. The point, raised by the appellant, therefore, is one of first impression, the answer to which is of momentous import to the appellant. Deportation to Greece during these perilous times would be in effect the exiling of the appellant to a foreign land. For thirty-six years he has lived in this country and has become Americanized in his way of life. Every humane instinct rebels at the thought of an alien in such an unfortunate web of circumstance being summarily banished from this country when legal rights are still available to him to prevent his deportation.

We can find no more pungent expression evaluing the intent of the Congress as to the very section in question than that employed by Mr. Justice Douglas in the recent case of *Tan v. Phelan,* Opinion No. 370, October Term, 1947, decided February 2, 1948:

"We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile, *Delgadillo v. Carmichael,* 333 U. S. —. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.

Reversed."

Dated, San Rafael, California,
April 8, 1948.

Respectfully submitted,
JEROME A. DUFFY,
Attorney for Appellant.